

AUGUST 7. 1765.

A N S W E R S
F O R

JOSEPH, JOHN, JAMES, CHARLES, and
ELSPETH NICOLS, Children of *Jo-
seph Nicols*, by the deceast *Margaret
Mestine* his Spouse, and for the said
Joseph, as Administrator in Law to
his Children ;

T O T H E
PETITION of *Robert Mestine* in
Bircelacy.

MARGARET MESTINE, mother to the respondents,
was a daughter of the deceast *John Mestine*, te-
nant in *Bircelacy*, and sister to the petitioner ; and
having married the said *Joseph Nicols* some years
ago, she got no tocher or other provision at her marriage ;
but as her father was a substantial tenant, her husband and
she had considerable expectations at his death.

The said *John Mestine* having died some years ago, his
eldest son *Robert*, the petitioner, took possession of all his
moveables, and intromitted with his other subjects. Upon
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that occasion, *Margaret Mestine*, who was then alive, and her husband, demanded from the petitioner the legitim, or share of her father's effects that the said *Margaret* was intitled to. Like demands were made upon the petitioner by the other younger children; and these he satisfied, by paying them their shares. He acknowledged likewise the justice of the demand made by *Margaret*; but having differed about the extent of the sum she was intitled to, a verbal submission ensued to an arbiter, who, after being informed of the circumstances, decerned the petitioner to pay to his sister the whole sum claimed by her. But,

As there was no written submission, this award could not be enforced; and while matters continued upon that footing, *Margaret Mestine* died, leaving issue four sons and a daughter, the respondents, upon whom, as she had survived her father, her right of legitim devolved in the course of succession.

After *Margaret Mestine's* death, the petitioner was repeatedly applied to, on behalf of the respondents, that he would account to them for their mother's share of their grandfather's effects. Sometimes he listened to these applications, and seemed desirous to have the matter ended by another submission. And as the respondent, *Joseph Nicols*, was unwilling to go to law with a person so nearly related to his children, he was from time to time amused by these appearances, till at last, finding that the petitioner was not serious in any amicable proposal, it became necessary to bring an action against him.

Accordingly, an action was brought against the petitioner before the commissary of *Aberdeen*, at the instance of the respondents, the children of *Margaret Mestine*, with consent of the respondent *Joseph Nicols*, their father and administrator in law. It set forth in substance, that the petitioner, upon the death of *John Mestine*, his father, had intromitted with all his effects: That *Margaret Mestine* was intitled

intitled to her legitim out of these effects: That her children, the pursuers, had now the right to that claim; and therefore, concluding, that the petitioner should be liable to them in the sum of 800 merks, as the share of *John Mestine's* effects that *Margaret*, by her claim of legitim, was intitled to.

In defence against this action, the petitioner insisted on various pleas; *1mo*, That the respondents had no title to pursue. *2do*, That, supposing they had a title, the petitioner could not be liable to *Margaret Mestine* in any claim for legitim; nor could any legitim be due, as *John Mestine* had made over his whole effects to him by disposition, an extract of which was produced; the same with that subjoined to the petition. *3tio*, That this disposition bore the whole children, and *Margaret* among the rest, to have received their legitim. And, *lastly*, *4to*, That the disposition proceeding upon this narrative, imported a discharge of *Margaret's* legitim, as *Joseph Nicols*, her husband, was a subscribing witness to it.

Various proceedings were had in this action, unnecessary to be here mentioned. In general, the commissary was of opinion, that the respondents were intitled to their mother's legitim, notwithstanding the foresaid disposition, unless the petitioner could instruct, that the legitim had been paid. This he often averred in the course of the process, but offered no proof of it; and therefore, the commissary first pronounced one interlocutor, and then another, in the following terms: "Having advised this process, and in respect
" it appears, by the extract-disposition produced, that the
" same is of a testamentary nature, appoints the defender
" to instruct any payment to *Margaret Mestine* of her legitim; and if he shall fail, appoints him to give in an account, upon oath, of the whole effects intromitted with
" by him, in terms of the disposition produced."

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The petitioner complained of this judgment by a bill of advocacy, which being passed, came, in course of the rolls, before the Lord *Elliock* Ordinary, when his Lordship, upon advising pretty full minutes of debate, of this date, pronounced the following interlocutor: "Having
 Feb. 26. 1765. " considered the foregoing minute of debate, with the ex-
 " tract of the proceedings before the inferior court, remits
 " the cause in common form."—And to this interlocutor,
 July 10. 1765. his Lordship, upon advising a representation, with answers, adhered.—The petition reclaims.

And, in answering this petition, the respondents must observe, in the entry, that there are two facts averred by them, which the petitioner contradicts.—*First*, He denies that ever he paid any thing to his other brother and sisters, as their share of their father's effects, since the date of the foresaid disposition.—And, *2dly*, He denies, that ever *Margaret Mestine*, the respondent's mother, made any claim upon him for her legitim, during her life.—The respondents, however, do still adhere to their former averments, and insist, that frequent demands were made by their mother upon the petitioner, and that a submission was gone into for having these demands settled.—And they do further aver, that the petitioner has paid certain sums to the rest of his brothers and sisters, in lieu of their legitim, since the date of the foresaid disposition, and even since his father's death:—And, if these circumstances shall seem any-ways material in deciding the present question, the respondents offer to undertake a proof of them.

With respect, now, to the arguments pleaded in the petition, they seem to resolve into the following:—*1mo*, That the disposition by *John Mestine* to the petitioner, was a deed disposing of all his effects *inter vivos*, and, consequently, excluded the claim of his other children for their legitim. *2dly*, That supposing it to be a deed of a testamentary nature, still the claim of the respondents is excluded, because

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no claim was made by their mother for her legitim, during her life.—Or at any rate, *lastly*, That this claim was discharged, as the respondent *Joseph Nicol* is a subscribing witness to the deed in the petitioner's favour. This, so far as occurs to the respondents, is the sum of the petitioner's arguments.

Without following the petitioner particularly, your Lordships, in answer to the foregoing positions, will, in the *first* place, observe in the general, that the right of legitim, that is, the right of children to a part of their parents effects, is strongly founded in the law of nature, the civil law, and the municipal law of this country.—On the one hand, it is not presumed to be renounced by the child, nor can it be excluded by implication from any deed done by the child, unless such deed is executed for the special purpose of renouncing the legitim.—And on the other hand, a father is never presumed to exclude or debar his children from their legitim;—On the contrary, even where a father, during his own lifetime, gives a provision to a child, still that child is intitled to his legitim, unless it is excluded by the express deed and will of the father.—The respondents are advised, that these are established principles in the law of *Scotland*, which it is unnecessary to support with authorities or precedents. But more particularly,

2do, In the present case it has all along been denied, that ever *Margaret Mestine* received any provision whatever from her father, during his life; and, instead of signifying any inclination to exclude her from her legitim, it is obvious from the deed founded upon by the petitioner, that *John Mestine* thought his children intitled to their legitim, and believed they had received it; for the deed proceeds upon that narrative: And it is probable, that *John Mestine* was induced to think so, by the suggestions and assurances of the petitioner himself.—And, of consequence,

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3thio, As it was obviously the meaning of *John Mestine*, that his children should have their legitim, and to burden the deed in favour of the petitioner, with that quality: So, in as far as it does not appear that the children were satisfied, the petitioner must be liable to them, whether the deed in his favour is to be considered as a deed *inter vivos*, or of a testamentary nature.—And granting, that by this deed a mutual contract, as the petitioner contends, was established between him and his father, the payment of the legitim was a condition imposed upon the petitioner, which, by the acceptance of the deed, he became bound to perform.

And, with respect to the authority of Lord *Bankton*, vol. 2. p. 384. § 26. quoted by the petitioner, it is obvious, that it is by no means applicable to the present question.—The respondents do not dispute, that a father, by a deed in *liege poustie, inter vivos*, may convey away his effects, so as to disappoint the legitim altogether; but that is only where such appears to have been the intention of the father, and where there is no provision for the legitim in the deed; and the authority of Lord *Bankton* is applicable only to cases of that sort. But this case is extremely different; as it is obvious from the deed itself, that *John Mestine*, instead of meaning to disappoint the legitim of his other children, executed the disposition to the petitioner, in the belief and assurance, that his other children were to be satisfied for their claims on that head.

And therefore, altho' your Lordships should be inclinable to consider the disposition by *John Mestine* to the petitioner, as a deed *inter vivos*, still the petitioner must be liable to the respondents for their mother's legitim, unless he could have showed in what manner the same had been paid or satisfied:—But this he will not attempt, as it is a certain fact, that she never received one fixpence of her father's effects, either from himself, in his lifetime, or from this petitioner since his death.

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So much upon the supposition, that your Lordships shall consider the disposition by *John Mestine* to the petitioner, as a deed *inter vivos*.—At the same time, the respondents are advised, that this argument was unnecessary, as the deed which the petitioner founds his defence upon, is plainly of a testamentary nature; and, consequently, could not exclude the legitim, even if the granter had been so minded.

In the *first* place, It is manifestly not an ordinary deed of conveyance, but a general settlement of *John Mestine's* succession. *2dly*, It is obvious from the narrative, that parties understood it in that light themselves. And, *lastly*, There is still more evidence from the tenor of the dispositive clause, which is as follows: “ To and in favour of
“ *Robert Mestine* in *Bircelacy* my son, my hail goods, gear,
“ debts, sums of money, corns, cattle, outfight and infight
“ plenishing, and effects whatsoever, of whatever kind,
“ quality or denomination, presently pertaining and belong-
“ ing to me, or be resting owing to me, by whatever person
“ or persons, the time of my decease”.

This is clearly the terms of a testamentary deed.—And although it is said by the petitioner, that he succeeded to no money or effects after the date of the disposition: Supposing it to be true, it does not alter the nature of the deed:—It is, nevertheless, a settlement of succession, and not a conveyance *inter vivos*; and from the clause above recited, it is manifest, that however the petitioner may have intromitted irregularly, he had properly no right from the foresaid disposition to the debts owing to his father, till after his father's death.

And, whereas it is in substance argued in the petition,
“ That supposing the disposition to be a testamentary
“ deed, the pursuers have no claim for legitim; *imo*, Be-
“ cause no claim was brought during the lifetime of their
“ mother.—And, *2do*, That the respondent *Joseph Nicol*,
“ by signing witness to the deed, in favour of the petiti-
“ oner,

“oner, has homologated the conveyance, and discharged the legitim.”—It is answered,

To the first of these pleas, *imo*, In point of fact, That several demands were made for the legitim during the life of *Margaret Mestine* herself, and an award in her favour, upon a verbal submission, was pronounced by an arbiter, which the petitioner refused to stand to. *2dly*, In point of law, the death of *Margaret Mestine* does in no shape impair the claim for her legitim.—She survived her father a considerable time; and, consequently, tho’ she herself did not recover her legitim, her right transmits to the respondents her children equally, as if it had been recovered during her own lifetime.

And here again your Lordships will observe, the petitioner has wholly misapplied the authority of Lord *Bankton*, vol. 2. page 384. § 24. His Lordship in that place, lays down a doctrine which is established in the law of *Scotland*, *viz.* that grandchildren, where their parent predeceased their grandfather, are intitled to no legitim upon their grandfather’s death.—That is no doubt a rule in the law of *Scotland*; but it is in no shape applicable to the present case, as *Margaret Mestine*, the parent of the respondents, survived their grandfather a considerable while; and, consequently, her right of legitim transmitted with her other succession to her children.

And with respect to the *last* position urged by the petitioner, *viz.* That the claim of the respondents is discharged, because their father and administrator in law, signed witness to the disposition by *John Mestine* to the petitioner: The respondents confess they do not understand this doctrine:—They are advised, it is a principle in law, that a subscribing witness attests only the verity of the subscription; and that it is not necessary, nor does the law presume, that the witness knows the substance of the deed; and, consequently, in general, tho’ the deed should contain any thing to
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his prejudice, he is not presumed, when he subscribes only as a witness, to consent to it.

And as to the decisions founded on in the petition; they are, with great submission, noways applicable to the present case. In these cases, subscribing as a witness was held as a consent to the deed, because the deeds were of such a nature that the witness's consent was absolutely necessary; and therefore it was presumed that he knew their contents, and by his signing as a witness under these circumstances consented to them. But, in this case, the consent of *Joseph Nicols* was not absolutely necessary to the deed, and therefore his signing witness to it cannot import an acquiescence in its contents, upon the general principle, that a witness attests only the verity of the subscription. And so it was decided in a case perfectly analogous to the present, *Veitch contra Pallat*, observed by Lord *Stair*, 26th July 1672; where it was found, that

“ one subscribing as witness to a right granted by his debtor,
 “ his knowledge and acquiescence in the deed was not there-
 “ by presumed.

Diet. Vol. 1.
p. 378.

And it would not alter the case, altho' it were supposed, which cannot be admitted, that the respondent's father, when he subscribed witness to this deed, knew its contents; it could only thence be inferred, that he consented to a thing which he had no title or power to prevent, viz. a testamentary settlement by *John Mestine* in favour of his son. But it would be impossible from thence to infer, that he thereby intended to discharge the claim of legitim competent to his wife, for which she had never received any thing; and which indeed he could not discharge, even by a particular deed for that purpose, unless his wife had been also a party to the deed.

Upon the whole, the respondents humbly hope your Lordships will be of opinion, that in whatever light the foresaid disposition is to be viewed, it could not exclude the claim of their mother to her legitim: and therefore, that the petitioner must be liable to them in her proportion of her father's effects,

effects, as the same did amount, either at the date of the disposition, or at his death, unless the petitioner can show that the legitim was satisfied, renounced, or expressly discharged: And, of consequence, that your Lordships will affirm the Lord Ordinary's interlocutor, remitting the cause simply to the commissary, whose procedure from the beginning was, in all respects, perfectly regular and unexceptionable.

In respect whereof, &c.

COSMO GORDON.

